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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-614

U-ANCHOR ADVERTISING, INC.,

Petitioner,

v.

N. H. BURT, d/b/a GRANOT LODGE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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No.

U-ANCHOR ADVERTISING, INC.,

Petitioner,

v.

N. H. BURT, d/b/a GRANOT LODGE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, U-Anchor Advertising, Inc., respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the Supreme Court of Texas entered in this proceeding on July 13, 1977.

OPINIONS

The opinions of the Supreme Court of Texas, 553 S.W.2d 760 (Tex. 1977), and the Texas Court of Civil Appeals, 544 S.W.2d 500 (Tex.Civ.App. 1976), appear in Appendix B hereto.

JURISDICTION

The Judgment of the Supreme Court of Texas was entered on July 13, 1977. A timely motion for rehearing was denied on July 27, 1977, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

I. Whether the Supreme Court of Texas erred in holding that the literal reach of the Texas Long-Arm Statute violates due process because it confers jurisdiction where a non-resident enters into a contract with a resident of Texas to be performed in Texas.

II. Whether an Oklahoma resident who contracts with a Texas resident as a result of solicitation in Oklahoma by the Texas resident may, consistent with due process, be sued in Texas where the contract has been substantially performed by those parties in Texas.

III. Whether the Supreme Court of Texas erred in holding that assertion of jurisdiction over a non-resident Defendant would violate due process, even though within the literal scope of the Texas Long-Arm Statute, where the Defendant entered into a contract with a Texas resident which required substantial performance by both parties in Texas.

STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution and Article 2031b of the Texas Revised Civil Statutes Annotated, which are set forth in pertinent part in Appendix A.

STATEMENT OF THE CASE

U-Anchor's sales representative contacted Burt at his motel, the Granot Lodge, in Oklahoma. As a result of this contact, U-Anchor and Burt entered into a contract which called for U-Anchor to erect five (5) roadside advertisements for the Granot Lodge. The contract provided that it be accepted by an officer of U-Anchor, whose office is in Amarillo, Texas. The testimony shows that no officer of U-Anchor actually signed the agreement; however, it is undisputed that U-Anchor undertook to perform upon receipt of the order. Thus, the contract contemplated that the final act required to form a binding contract was to be performed in Texas. The contract also required Burt to make monthly payments to U-Anchor's office in Amarillo.

U-Anchor constructed the signs in Amarillo. Once completed, they were transported to Oklahoma and installed at various roadside locations. Burt apparently made six (6) payments to U-Anchor's office in Amarillo, but has refused to make the 30 remaining payments.

U-Anchor filed suit in the 47th District Court of Texas to recover the unpaid sum under the contract, with service of process on Burt accomplished according

to Article 2031b, Texas Revised Civil Statutes. Burt filed a Special Appearance under Rule 21a, Texas Rules of Civil Procedure, contending that the court lacked personal jurisdiction. The Trial Court sustained the Special Appearance. This action was affirmed by the Texas Court of Civil Appeals and Texas Supreme Court.

The Constitutional question involved in this petition was originally raised in Burt's Special Appearance to Present Motion to the Jurisdiction, wherein he alleged:

> Defendant is a non-resident of the State of Texas and was served with citation outside the State of Texas. Defendant does not have, with regards to the cause of action alleged by Plaintiff, those minimum contacts with the State of Texas that will constitutionally support jurisdiction over Defendant's person in this cause.

The trial court sustained Burt's Motion by its Order signed on October 27, 1975. In a timely motion for a new trial, U-Anchor contended that the trial court erred in sustaining Burt's Motion to the Jurisdiction on the following grounds:

> 1) The trial court erred in sustaining Defendant's Motion to the Jurisdiction.
>
> 2) The trial court erred in concluding that there was not sufficient contact on the part of the Defendant with the State of Texas, pursuant to Article 2031b, Texas Revised Civil Statutes, to sustain jurisdiction in a Texas Court.
>
> 3) The trial court erred in concluding that the Defendant was not "doing business within the State of Texas", pursuant to Article 2031b, Texas Revised Civil Statutes.
>
> 4) The court erred in not sustaining jurisdiction over the person of the Defendant.

This Motion was overruled by the trial court's Order signed on October 28, 1975.

Petitioner unsuccessfully presented the following point of error in the Texas Court of Civil Appeals:

> The court erred in sustaining Defendant's Motion to the Jurisdiction, because there were sufficient contacts on the part of the Defendant with the State of Texas so that it would not have offended traditional notions of fair play and substantial justice for the trial court to sustain jurisdiction.

In its application for Writ of Error filed with the Supreme Court of Texas, petitioner again raised this point of error, saying:

> The Court of Civil Appeals erred in sustaining the trial court's dismissal for want of jurisdiction because there were sufficient contacts on the part of the Defendant with the State of Texas so that it would not have offended traditional notions of fair play and substantial justice for the trial court to sustain jurisdiction.

The Supreme Court, in passing on this contention, stated:

> The facts of this case bring it within the literal reach of Art. 2031b, but, as detailed above, the due process clause of the Fourteenth Amendment prohibits Texas courts from exercising jurisdiction over Burt in a suit arising out of his contract with U-Anchor.

REASONS FOR GRANTING THE WRIT

I.

THERE IS SUBSTANTIAL CONFUSION IN THE LOWER COURTS REGARDING DUE PROCESS AND LONG-ARM JURISDICTION, WHICH HAS RESULTED IN ERRONEOUS RESULTS DUE TO IMPROPER ANALYSIS OF THE RELATIONSHIP BETWEEN VARIOUS RECURRING FACTORS AND THE TWO ELEMENTS OF THE TEST ENUNCIATED BY THIS COURT.

The rule pertaining to a state's power to obtain "long-arm" jurisdiction over a non-resident was stated in *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945):

> [D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he has certain minimum contact with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." [Citations omitted]

In *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958), the Court elaborated on this test, saying that "there must be some act by which a defendant purposefully avails itself of the privilege of conducting activities within the forum State. . . ." These decisions provide a two-part test by which courts may determine whether jurisdiction is consistent with due process. This test requires that "there must be some minimum contact with the state which results from an affirmative act of the defendant . . . [and] it must be

fair and reasonable to require the defendant to come into the state and defend the action." 2 *Moore's Federal Practice*, ¶4.25[5]; *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 495 (5th Cir. 1974).[1]

The two requirements pose distinct questions, and proper analysis requires that they be dealt with separately. There is a tendency for the courts to address the problem as a unitary one. At best, this results in analysis which is confusing because it does not clearly set out what criteria are relevant to each element. Judge Celebrezze of the Sixth Circuit, in a well-reasoned opinion, delineated the differences between these two requirements. *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 226-28 (6th Cir. 1972). The first requirement, that of an affirmative act, focuses on the nature of the act itself. The question is simply whether certain conduct reflects that defendant's involvement with the forum state was intentional. *Id.* at 228. This inquiry is subject to a substantial degree of simple classification; that is, there are many acts which are, inherently, sufficiently purposeful to satisfy this requirement. *Id.* at 226. The flexibility of the *International Shoe* doctrine is contained in the second requirement, that of fairness. *Id.* at 268. Thus, even though the minimum contacts test has been satisfied, jurisdiction may or may not be proper, depending on

[1] Some courts, including the Supreme Court of Texas in this case, have characterized the test as having three elements. These courts add the requirement that the cause of action arise out of the defendant's contacts with the state. Since it is undisputed that the cause of action arose out of the contact which petitioner asserts provides the necessary contacts, this element will not be discussed in the petition.

the circumstances surrounding the contact. *See Shaffer v. Heitner*, ____ U.S. ____, ____ S.Ct. ____, 53 L.Ed.2d 683, 698, n. 19 (1977).

The lower courts have essentially developed two approaches in dealing with "long-arm" jurisdiction cases involving contracts between business entities that are residents of different states. One approach is to inquire whether the non-resident defendant could have reasonably anticipated substantial impact on the forum state as a result of the contract. *E.g. Product Promotions, Inc. v. Cousteau*, 496 F.2d 483, 497 (5th Cir. 1974); *Electro-Kraft Corp. v. Maxwell Electronics Corp.*, 417 F.2d 365, 369 (8th Cir. 1969); *Inpaco, Inc. v. McDonald's Corp.*, 413 F. Supp. 415, 418 (E.D. Pa. 1976).

The second approach involves an "active/passive" or "buyer/seller" test for determining whether jurisdiction is proper. A passive buyer is one who merely purchases goods without conducting negotiations on contract terms or requiring the goods to meet his peculiar specifications. These courts hold that the non-resident buyer or passive party may not be sued in the seller's or active party's home state. *E.g. Whittaker Corp. v. United Aircraft Corp.*, 482 F.2d 1079, 1084-85 (1st Cir. 1973); *Jem Engineering & Mfg., Inc. v. Toomer Elec. Co.*, 413 F. Supp. 481, 484 (N.D. Okla. 1976); *McQuay, Inc. v. Samuell Schlosberg, Inc.*, 321 F. Supp. 902, 906 (D. Minn. 1971). The Supreme Court of Texas, in the case below, utilized this approach.

The "buyer/seller" and "active/passive" tests have resulted in undue weight being given to this single factor. Properly analysed, the "buyer/seller" and "active/passive" factors are relevant only to the

question of fairness, not the existence of a minimal contact or purposeful act.[2] However, the courts which have utilized this analysis have concluded that this factor is crucial to determining whether the defendant has performed the purposeful act required by *Hanson*. The courts have determined that merely entering into a contract with a forum resident does not satisfy the purposeful act test. They require the additional factor that the defendant be a seller or active buyer. This results in holdings, such as that of the Supreme Court of Texas below, on what constitutes purposeful action, which holdings conflict with the prior holding of this Court in *McGee*.

Once the courts have decided that there is no purposeful act, their analysis of the fairness of "long-arm" jurisdiction over a non-resident defendant is tainted; it is difficult to conceive of any court concluding that jurisdiction would be fundamentally fair without the existence of a purposeful act. Therefore, improper consideration of the "buyer/seller" or "active/passive" factor in determining whether there is a purposeful act can result in erroneous holdings, such as those below, on both elements of the due

[2] This distinction is discussed at length in Judge Celebrezze's opinion in *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 226-28, 233 (6th Cir. 1972). The minimum contact or purposeful act requirement is a constant; that is, a given act either is or is not purposeful within the meaning of due process. This is merely a "baseline" requirement. The flexibility of the due process test is contained in the fundamental fairness requirement; that is, would it be reasonable, in light of all the circumstances, to require a defendant who has performed a purposeful act to defend suit in the forum state.

process test. Additionally, this confusion has resulted in decisions by the federal courts of appeals and state courts which are not consistent in principle because of the focus of the courts' analyses. *Compare Product Promotions, Inc. v. Cousteau*, 495 F.2d 483 (5th Cir. 1974); *United States Ry. Equip. Co. v. Port Huron & D.R.R.*, 495 F.2d 1127 (7th Cir. 1974) *and Electro-Kraft Corp. v. Maxwell Electronics Corp.*, 417 F.2d 365 (8th Cir. 1969) *with Whittaker Corp. v. United Aircraft Corp.*, 482 F.2d 1079 (1st Cir. 1973) *and U-Anchor Advertising, Inc. v. Burt*, 553 S.W.2d 760 (Tex. 1977) (the case below).

Contracts between business entities which are residents of different forums is a common occurrence, and the question of "long-arm" jurisdiction in such cases has been the subject of considerable litigation in both state and federal courts. This Court should clarify which criteria may correctly be considered in dealing with each of the two elements involved in determining whether jurisdiction is proper. The harm that results from this lack of clarification is especially evident in those decisions incorrectly utilizing the "buyer/seller" or "active/passive" factor, as discussed above. Additionally, many other factors which courts have viewed as relevant – *e.g.* place of making the contract, place of performance, who initiates the transaction, the relative size and bargaining power of the parties, the extent of defendant's interstate activity unrelated to the cause of action in question – are present in all or a substantial percentage of such cases. Although Petitioner recognizes that this Court cannot set out rigid rules for determining whether due process is satisfied, it can and should elaborate on the distinction between factors

relevant to purposeful activity and those relevant to fundamental fairness. The Court should also provide some guidelines as to the degree of relevance or weight to be given factors which recur in similar fact situations, so as to promote the development of a consistent and rational body of law by the lower courts.

II.

THE DECISION OF THE SUPREME COURT OF TEXAS BELOW ERRONEOUSLY CONCLUDED THAT ASSERTION OF JURISDICTION, ALTHOUGH WITHIN THE LITERAL TERMS OF THE TEXAS LONG-ARM STATUTE, WOULD VIOLATE DUE PROCESS AND, IN EFFECT, DECLARED THE STATUTE UNCONSTITUTIONAL.

In its decision, the Supreme Court of Texas recognized that Burt's contacts with the State of Texas fell within the literal terms of the Texas Long-Arm Statute.[3] However, the court concluded that assertion of jurisdiction would violate both elements of the due process test; that is, the court concluded that Burt had performed no purposeful act and that assertion of jurisdiction would be fundamentally unfair. If the Supreme Court of Texas is correct in holding that facts within the literal terms of the statute did not comply with either element of the due process test, then the

[3] Several other states have comparable statutory provisions, which are set out in Appendix D.

statute is clearly unconstitutional due to overbreadth. Similarly, since this Court has held that the due process question in each long-arm jurisdiction case must be decided on its individual facts, any statute which provided that specific acts were a sufficient basis for long-arm jurisdiction would likewise be unconstitutionally broad in some fact situation. Therefore, this Court should set out the permissible scope of a state statute providing that certain acts are a sufficient basis for long-arm jurisdiction.

Petitioner contends that the Supreme Court of Texas committed two errors in passing on the due process question, one grievous and the other somewhat more subtle, although error nonetheless. These errors resulted in the lower court's holdings that neither the purposeful act nor the fairness element of the due process test was satisfied. We will discuss the soundness of these holdings separately.

A. PURPOSEFUL ACT

The contract here is between a resident of Texas and a resident of Oklahoma. It was freely entered into and provided that Burt would perform by making monthly payments in Texas. The act of entering into a contract with a forum resident which requires the non-resident to perform in the forum state constitutes minimum contact or purposeful activity.[4] Therefore, it is evident

[4] *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957). See *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483 (5th Cir. 1974); *United States Ry. Equip. Co. v. Port Huron & D.R.R.*, 495 F.2d 1127 (7th Cir.
(continued)

that this "baseline" requirement has been satisfied, and the Supreme Court of Texas clearly erred in holding that Burt did not meet the purposeful act test.

B. FAIRNESS

The question presented under this portion of the jurisdictional test is whether requiring Burt to defend this action in Texas would offend traditional notions of fair play and substantial justice. Essentially, this determination must be made from a consideration of various factors concerning the nature of the parties and the circumstances surrounding the transaction in question.

This transaction was initiated when a U-Anchor salesman contacted Burt at his motel in Clinton, Oklahoma. As a result of this contact, Burt placed an order for five (5) large (5' x 14') advertising displays. U-Anchor was required to construct the signs with an advertising design agreeable to Burt. Burt agreed to make 36 monthly payments to U-Anchor's office in Potter County, Texas (Amarillo). As a result of this

(footnote continued from preceding page)
1974); *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220 (6th Cir. 1972); *Electro-Kraft Corp. v. Maxwell Electronics Corp.*, 417 F.2d 365 (8th Cir. 1969); *Inpaco, Inc. v. McDonald's Corp.*, 413 F. Supp. 415 (E.D. Pa. 1976); *Standard Leasing Co. v. Performance Systems, Inc.*, 321 F. Supp. 977 (N.D. Tex. 1971); *Custom Leasing, Inc. v. Gardner*, 307 F. Supp. 161 (N.D. Miss. 1969); *Simpson Timber Co. v. Great Salt Lake Minerals & Chem. Corp.*, 296 F. Supp. 243, 246 (D. Ore. 1969); Comment, *Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness*, 69 Mich.L.Rev. 300, 321-25 (1970).

contract, U-Anchor specially designed and constructed the five displays at its facility in Amarillo. Once the signs were prepared, they were mounted on a metal base and transported to Oklahoma, where they were installed at the locations stated in the contract. Burt apparently made six (6) of the payments to U-Anchor's office in Amarillo, as required, but has refused to make the remaining payments.

Thus, we have a situation in which two businessmen voluntarily entered into a contract. There is nothing in the record which would indicate that either party possessed sufficient bargaining power to dictate terms to the other. This is not a situation in which a small businessman merely ordered a small amount of stock goods from a manufacturer in another state. The contract required the Texas resident to specially prepare advertising displays for the Granot Lodge; obviously, these are not goods which could be sold to another consumer. There are several factors present here which courts have considered important in sustaining jurisdiction:

(1) THE CONTRACT REQUIRED PAYMENT IN THE FORUM STATE. *United States Ry. Equip. Co. v. Port Huron & D.R.R.*, 495 F.2d 1127, 1129-30 (7th Cir. 1974); *Standard Leasing Co. v. Performance Systems, Inc.*, 321 F. Supp. 977, 979 (N.D. Tex. 1971); *Custom Leasing Inc. v. Gardner*, 307 F. Supp. 161, 163-64 (N.D. Miss. 1969).

The contract expressly provides that Burt perform in Texas by making the required payments at U-Anchor's office at Amarillo. This is the only act, other than approval of the display design, which Burt is required to perform under the contract, so that it is apparent he

voluntarily contracted to perform his obligations in Texas.

(2) THERE WAS FORESEEABLE IMPACT ON THE FORUM STATE. *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 497 (5th Cir. 1974); *Electro-Kraft Corp. v. Maxwell Electronics Corp.*, 417 F.2d 365, 369 (8th Cir. 1969).

Burt knew that he was contracting with a Texas resident and did so voluntarily. Since he knew U-Anchor was a Texas resident, he could reasonably have anticipated that U-Anchor would undertake substantial performance in Texas. U-Anchor did, in fact, perform the bulk of its obligations under the contract in Texas. The five (5) advertising displays were constructed and painted in Texas. It is the Texas company, and potentially its Texas suppliers and workers, which will be harmed by Burt's failure to make the required payments under the contract, thus adversely affecting the State of Texas.

(3) THE DEFENDANT ENTERED INTO NEGOTIATIONS WITH THE PLAINTIFF. *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 231 (6th Cir. 1972); *Whittaker Corp. v. United Aircraft Corp.*, 482 F.2d 1079, 1084 (1st Cir. 1973); *Inpaco, Inc. v. McDonald's Corp.*, 413 F. Supp. 415, 419 (E.D. Pa. 1976).

The face of the contract, reproduced in Appendix C, reflects at least two items which were the subject of negotiation between the parties. First, the printed contract provides for a standard term of 60 months. However, the parties have changed this to read 37 months. Additionally, the contract requires that the advertising design placed on the displays be mutually

agreed upon. Thus, it is apparent that there were negotiations between the parties relating to the terms and subject matter of the contract.

(4) THE CONTRACT REQUIRED THE PLAINTIFF TO SPECIALLY PRODUCE GOODS TO THE DEFENDANT'S SPECIFICATIONS. *Whittaker Corp. v. United Aircraft Corp.*, 482 F.2d 1079, 1984 (1st Cir. 1973).

Advertising displays are, by their very nature, a product which must be specially produced for each client. The contract recognizes this, providing that the parties will mutually agree on the design to be placed on the displays. Thus, a direct result of the contract was that U-Anchor caused considerable expenditure of time and material, obtained from Texas workers and suppliers, to fulfill its contract. These efforts are not transferable to any other client. Burt could have reasonably anticipated that the contract would have this result.

(5) THE CONTRACT WAS ACCEPTED IN THE FORUM STATE. *Product Promotions, Inc. v. Cousteau*, 496 F.2d 493, 495 (5th Cir. 1974).

The contract provides spaces for acceptance by U-Anchor's salesman *and* its president. The salesman apparently signed the contract in Oklahoma. However, Burt reasonably should have known that acceptance by U-Anchor's president would occur in Texas. Although the president never actually signed the contract (Burt erroneously signed in the space provided for U-Anchor's president), the contract required some further act other than the salesman's signature to become binding. This final act, either signing by U-Anchor's president or undertaking performance, occurred in Texas, and Burt reasonably would have expected it to occur in Texas.

(6) THE DEFENDANT'S OPERATIONS HAVE SUBSTANTIAL INTERSTATE ASPECTS. *Wilkerson v. Fortuna Corp.*, 554 F.2d 745, 746, 748 (5th Cir. 1977); *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 233-34 (6th Cir. 1972); *Inpaco, Inc. v. McDonald's Corp.*, 413 F. Supp. 415, 419 (E.D. Pa. 1976).

The location and purpose of the five (5) displays installed by U-Anchor are relevant to the fairness of requiring Burt to defend this suit in Texas. As the Court will observe from the map reproduced at page 1c of the Appendix,[5] Clinton, Oklahoma, where the Granot Lodge is located, is situated at the cross-roads of two major federal highways. One, Interstate 40, runs east from Texas, through Oklahoma and into Arkansas. The other, U.S. Highway 183, runs north from Texas, through Oklahoma and into Kansas. Two (2) of the displays are located on Interstate 40, just east of the Oklahoma border; a third is located on U.S. Highway 183 just south of Clinton, Oklahoma. The other two (2) are located on Interstate 40 east of Clinton. All are located so as to solicit business from travelers utilizing major highway arteries of interstate commerce. Many of these travelers would not be Oklahoma residents.

Burt could especially be expected to anticipate that Texas residents would be attracted by the three (3)

[5] This map was not part of the record below. However, geographical locations may be judicially noted. *Southerland v. St. Croix Taxicab Ass'n.*, 315 F.2d 364, 367 (3rd Cir. 1963); *Pearson v. United States*, 150 F.2d 219, 221 (10th Cir. 1945). This Court may take judicial notice of facts. *Delaware, L.&W.R.R. v. Koske*, 279 U.S. 7, 12, 49 S.Ct. 202, 73 L.Ed. 578 (1929) (Judicial notice taken of time of sunrise.)

displays located between his motel and the nearby Texas borders; to a lesser extent, he could anticipate that Texas residents returning to their homes would be attracted by the other two (2) signs. The fact that Burt conducts a business that customarily caters to a large number of non-residents and that he undertook advertising which, realistically, would be directed at a substantial number of Texas residents contribute to the fairness of Burt being required to defend this suit in Texas. The increased business contacts with non-residents increases the likelihood of Burt being required to defend suit elsewhere. This is especially true as regards Texas, given the proximity to the Texas border and the fact that the two major highways connect Texas and Oklahoma. The increased likelihood of suit in Texas should cause Burt to be prepared to defend suit there, or at least disclose a willingness to accept that risk. Where a party is or reasonably should be prepared to expect suit in a forum, the fairness of requiring him to defend suit there is enhanced.

(7) REQUIRING THE DEFENDANT TO COME TO THE FORUM STATE WOULD RESULT IN NO SUBSTANTIAL INCONVENIENCE TO THE DEFENDANT. *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 498 (5th Cir. 1974).

Finally, another factor generally considered relevant by the courts is the inconvenience defendant would be subjected to by virtue of being required to defend a lawsuit in a distant state. Here, the relatively small distance separating Clinton, Oklahoma, and Amarillo, Texas, indicates that any inconvenience which defendant might suffer would be comparatively minimal. The inconvenience suffered by Burt would, at most, be

slightly greater than the inconvenience to which he would be subjected if sued in another part of Oklahoma. Where the defendant resides near the forum state, and the inconvenience of defending suit there is comparatively slight, a lesser showing of other factors relating to the reasonableness of the forum should satisfy the requirements of due process.

C. EFFECT OF HOLDINGS

If permitted to stand, the Supreme Court of Texas' opinion effectively renders this portion of the Texas "Long-Arm" Statute unconstitutional. A statute which authorizes the use of "long-arm" jurisdiction in a fact situation where the exercise of that jurisdiction would violate due process must have been drawn too broadly. This Court should not permit this decision to stand since it is based on an erroneous application of the controlling precedent.

It should be noted that the Texas statute could be construed consistent with due process requirements even if the lower court erred only as to the purposeful act element. This Court could conclude that Article 2031b sets out a standard for determining whether the purposeful act requirement has been met. Therefore, if the lower court erred only in that holding, this Court should still point out the error and permit the Supreme Court of Texas to properly address the constitutionality of this statute.

CONCLUSION

For the reasons stated above, this petition presents substantial and recurring questions regarding the amenability to suit of non-resident business entities which enter into contracts with residents of the forum state. The confusion regarding the proper criteria and method of analysis to be utilized in determining whether assertion of long-arm jurisdiction comports with due process has resulted in an erroneous decision by the Supreme Court of Texas which effectively declares a portion of the Texas "Long-Arm" Statute, Article 2031b, unconstitutional. Additionally, this confusion has resulted in decisions of the various federal courts of appeals and highest state courts which conflict with one another, as well as with decisions of this Court. This Petition for Writ of Certiorari should therefore be granted.

Respectfully submitted,

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APPENDIX "A"

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> . . . Nor shall any State deprive any person of Life, Liberty, or Property, without due process of Law . . .

Article 2031b of the Texas Revised Civil Statutes Annotated provides in pertinent part:

> Section 3. Any foreign corporation association, joint stock company, partnership or non-resident natural person that engages in business in this State, irrespective of any Statute of law respecting designation or maintenance of resident agents, and does not maintain a place of regular business in this State or a designated agent upon whom service may be made upon causes of action arising out of such business within the State shall be deemed equivalent to an appointment by such foreign corporation, joint stock company, association, partnership or non-resident natural person of the Secretary of State of Texas as agent upon whom service of process may be made in any action, suit or proceedings arising out of such business done in this State, wherein such corporation, joint stock company, association, partnership or non-resident natural person is a party or is to be made a party.
>
> Section 4. For the purpose of this Act, and without including other acts that may constitute doing business, any foreign corporation, joint stock company, association, partnership, or non-resident natural person shall be deemed doing business in this State by entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State, or the committing of any tort in whole or in part in this State.

APPENDIX B

U-ANCHOR ADVERTISING, INC.,
Petitioner,

v.

N. H. BURT, d/b/a Granot Lodge,
Respondent.

No. B-6516

Supreme Court of Texas

July 13, 1977
Rehearing Denied July 27, 1977

Plaintiff, a Texas corporation, instituted suit for breach of contract against defendant, a resident of Oklahoma. Defendant entered a special appearance to contest jurisdiction of the Texas court. District Court No. 47, Potter County, Poff, J., sustained defendant's motion to the jurisdiction, and was affirmed by the Amarillo Court of Civil Appeals, Seventh Supreme Judicial District, Robinson, J., 544 S.W.2d 500. The Supreme Court, Steakley, J., held that: (1) defendant, who mailed checks to plaintiff's office in Texas, was "doing business" in Texas within meaning of long-arm statute; (2) defendant could not be said to have purposefully conducted activities within Texas, and (3) the exercise of jurisdiction by Texas courts would offend traditional notions of fair play and substantial justice, depriving defendant of due process of law.

Affirmed.

1. Courts 12(2)

Defendant, a resident of Oklahoma who entered a written contract with plaintiff, a Texas resident, which obligated defendant to perform his payment obligations at plaintiff's office in Texas was "doing business" in Texas within meaning of long-arm statute. Vernon's Ann.Civ.St. art. 2031b, §§3, 4.

See publication Words and Phrases for other judicial constructions and definitions.

2. Courts 12(2)

Texas long-arm statute reaches as far as the federal constitutional requirements of due process will permit; thus, courts may focus on the constitutional limitations of due process rather than engaging in technical and abstruse attempts to consistently define "doing business." Vernon's Ann.Civ.St. art. 2031b.

3. Courts 12(2)

For a defendant to be subject to Texas long-arm jurisdiction, although the cause of action against defendant is connected with a contractual obligation assumed by defendant and partially performable in Texas, defendant must also have purposefully done some act or consummated some transaction in Texas, and the assumption of jurisdiction by the Texas courts must be found not to offend traditional notions of fair play and substantial justice.

4. Courts 12(2)

Defendant, whose contract with Texas resident was solicited, negotiated, and consummated in Oklahoma, who did nothing to support an inference of any purpose to exercise the privilege of doing business in Texas, and whose contacts with Texas were not grounded on any expectation or necessity of invoking Texas law, could not be said to have purposefully conducted activities within Texas, for purposes of long-arm jurisdiction.

5. Constitutional Law 305(5)

Where the quality, nature, and extent of defendant's activity in Texas were minimal consisting only of mailing checks to plaintiff's office in Texas, and fact that his contract with plaintiff was solicited, negotiated and consummated in Oklahoma might have led defendant to reasonably expect its enforcement to be governed by Oklahoma law, the exercise of jurisdiction by Texas courts would offend traditional notions of fair play and substantial justice, depriving defendant of due process of law. U.S.C.A. Const. Amend. 14.

6. Constitutional Law 305(5)

The nature and extent of the contacts of a nonresident with the forum state determine whether or not the forum may exercise in personam jurisdiction over the nonresident, but the infinite variety of such

contacts and the vagueness of the constitutional standard render a more definitive articulation of due process requirements impossible; narrow factual distinctions will often suffice to swing the due process pendulum. U.S.C.A. Const. Amend. 14.

B. Hal Miner, Amarillo, for petitioner.
Kenneth A. Back, Amarillo, for respondent.

STEAKLEY, Justice.

This is a suit for breach of contract. It was instituted in the 47th District Court of Potter County, Texas by U-Anchor Advertising, Inc., Petitioner, against N. H. Burt, doing business as Granot Lodge, Respondent. U-Anchor is a Texas corporation domiciled in Amarillo, Potter County, Texas. Burt is a resident of Clinton, Custer County, Oklahoma. Citation was served upon the Secretary of State of Texas as the presumed agent of Burt for service of process pursuant to Article 2031b, Tex.Rev.Civ. Stat.Ann., the Texas "long-arm" statute. Burt entered a special appearance to contest the jurisdiction of the Texas court pursuant to Rule 120a of the Texas Rules of Civil Procedure. The trial court sustained Burt's Motion to the Jurisdiction, and this was affirmed by the Court of Civil Appeals. It was the view of the court that while Burt was unquestionably doing business in Texas within the terms of Article 2031b, his contacts with Texas fell short of the requirements of due process. 544 S.W.2d 500. We affirm the judgment of the Court of Civil Appeals.

Certain additional facts bearing upon the question of jurisdiction appear undisputed. The written contract upon which suit was brought was executed by the parties in Clinton, Oklahoma. It resulted from solicitation by a salesman for U-Anchor who signed the contract for U-Anchor. The contract called for U-Anchor to place five advertising displays for Burt at various Oklahoma highway locations for a period of 36 months. Burt agreed to pay U-Anchor $80 monthly at its office in Amarillo, Potter County, Texas. U-Anchor constructed the signs in Amarillo and erected them at the Oklahoma locations. Burt mailed six and perhaps seven monthly payment checks to U-Anchor at its office in Amarillo, but he had no other contacts with Texas.

The controlling provisions of Section 3 and 4 of Article 2031b are as follows:

> Sec. 3. *Any . . . non-resident natural person that engages in business in this State*, irrespective of any Statute or law respecting designation or maintenance of resident agents, and does not maintain a place of regular business in this State or a designated agent upon whom service may be made upon causes of action arising out of such business done in this State, the act or acts of engaging in such business within this State shall be deemed equivalent to an appointment by such . . . non-resident natural person of the Secretary of State of Texas as agent upon whom service of process may be made in any action, suit or proceedings arising out of such business done in this State, wherein such . . . non-resident natural person is a party or is to be made a party.
>
> Sec. 4. For the purpose of this Act, *and without including other acts that may constitute doing*

> *business*, any . . . non-resident natural person shall be deemed doing business in this State *by entering into contracts* by mail or otherwise with *a resident of Texas to be performed in whole or in part by either party in this State*. . . . (Italics are added for emphasis).

[1, 2] Article 2031b provides that a non-resident entering into a contract with a Texas resident performable in part by either party in Texas shall be deemed to be doing business in Texas. The contract in question obligated Burt to perform his payment obligations at the office of U-Anchor in Amarillo, Texas, and thus he was "doing business" in Texas, within the meaning of the statute. We agree that in this respect, as well as with respect to "other acts that may constitute doing business," Article 2031b reaches as far as the federal constitutional requirements of due process will permit. We let stand the statement in *Hoppenfeld v. Crook*, 498 S.W.2d 52 (Tex.Civ. App.–Austin 1973, writ ref'd n.r.e.) "that the reach of Art. 2031b is limited only by the United States Constitution." See also *National Truckers Services, Inc. v. Aero Systems, Inc.*, 480 S.W.2d 455 (Tex.Civ.App.–Fort Worth 1972, writ ref'd n.r.e.).[1] The federal courts

[1] It may be noted that in 1975 Rule 108 of the Texas Rules of Civil Procedure was amended to add the words shown in italics:

> A defendant served with such notice shall be required to appear and answer in the same manner and time and under the same penalty as if he had been personally served with citation within the State *to the full extent that he may be required to appear and answer under the Constitution of the United States in an action either in rem or in personam.*

We stated that the purpose of the amendment is to permit acquisition of in personam jurisdiction to the constitutional limits.

have similarly construed Article 2031b. *See Product Promotions, Inc. v. Cousteau*, 495 F.2d 483 (5th Cir. 1974), and the cases there cited. Furthermore, such a construction is desirable in that it allows the courts to focus on the constitutional limitations of due process rather than to engage in technical and abstruse attempts to consistently define "doing business." *See* Thode, *In Personam Jurisdiction: Article 2031b, the Texas "Long-Arm" Jurisdiction Statute; and the Appearance to Challenge Jurisdiction in Texas and Elsewhere*, 42 Tex.L.Rev. 279, 307 (1964).

[3] The question, then, becomes one of due process. In *Cousteau, supra*, the Fifth Circuit concluded that the relevant federal decisions established a dual test for determining whether a court may exercise its jurisdiction without depriving a non-resident defendant of due process of law: "First, 'there must be some minimum contact with the state which results from an affirmative act of the defendant.' Secondly, 'it must be fair and reasonable to require the defendant to come into the state and defend the action.'" *Cousteau, supra*, at 494. *See also Jetco Electronic Industries, Inc. v. Gardiner*, 473 F.2d 1228 (5th Cir. 1973); 2 J. Moore, Moore's Federal Practice ¶4.25[5] (1975). In *O'Brien v. Lanpar Company*, 399 S.W.2d 340 (Tex. 1966), this Court recognized the following statement of the three basic elements that must exist to sustain jurisdiction over a non-resident:

> (1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the

> assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and

See Tyee Construction Co. v. Dulien Steel Products, Inc., 62 Wash.2d 106, 381 P.2d 245 (1963). It is evident that U-Anchor's cause of action against Burt is connected with the contractual obligation assumed by Burt and partially performable in Texas. However, Burt must also have purposefully done some act or consummated some transaction in Texas, and the assumption of jurisdiction by the Texas courts must be found not to offend traditional notions of fair play and substantial justice.

[4] In *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958), the Supreme Court admonished that it would be "a mistake" to assume that the liberal due process standard enunciated in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), "heralds the eventual demise of all restrictions on the personal jurisdiction of state courts." *Hanson, supra*, 357 U.S. at 251, 78 S.Ct. at 1238. Explaining the requirements of due process, the Court continued:

> The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but *it is essential in each case that there be some*

> *act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.* [Emphasis added].

Id. at 253, 78 S.Ct. at 1239. *See Shaffer v. Heitner*, ___ U.S. ___, ___, 97 S.Ct. 2569, 53 L.Ed.2d ___ (1977). In the instant case the contacts of Burt with Texas are minimal and fortuitous, and he cannot be said to have "purposefully" conducted activities within the State. Burt's contacts with Texas were not grounded on any expectation or necessity of invoking the benefits and protections of Texas law, nor were they designed to result in profit from a business transaction undertaken in Texas. The contract was solicited, negotiated, and consummated in Oklahoma, and Burt did nothing to indicate or to support an inference of any purpose to exercise the privilege of doing business in Texas. Simply stated, Burt was a passive customer of a Texas corporation who neither sought, initiated, nor profited from his single and fortuitous contact with Texas.

[5] Furthermore, in the instant case the exercise of jurisdiction by Texas courts would offend traditional notions of fair play and substantial justice. As noted above, the only contact of Burt with Texas consisted of his execution of a contract stipulating that certain payments were to be made in Amarillo and his remittance of several payments to U-Anchor in Amarillo. Thus the quality, nature, and extent of Burt's activity in Texas is minimal. Indeed, it can be said that Burt has engaged in no "activity" in Texas, his only "activity" being the preparation and mailing of checks from his place of business in Oklahoma. Resolution of

the question of the relative convenience of the parties results in a stalemate since it is no doubt more convenient to each party to litigate in his home state. However, since the contract was solicited, negotiated, and consummated in Oklahoma, Burt might reasonably expect its enforcement to be governed by Oklahoma law. Considering the basic equities and circumstances of the case, we hold that Burt would not be accorded due process of law if required to defend the suit of U-Anchor in Texas. *See Hoppenfeld v. Crook, supra; Sun-X International Company v. Witt*, 413 S.W.2d 761 (Tex.Civ.App.—Texarkana 1967, writ ref'd n. r. e.).

Numerous decisions of the Texas courts of civil appeals hold that on the facts there presented the non-resident defendant would not be denied due process by being subjected to suit in Texas. With one exception, those cases are distinguishable on their facts. For example, in *National Truckers Service, Inc. v. Aero Systems, Inc.*, 480 S.W.2d 455 (Tex.Civ.App.—Fort Worth 1972, writ ref'd n. r. e.), the defendant had been doing business in Texas through its subsidiary, Transystems, Inc. When the subsidiary became delinquent on its accounts, Aero agreed to guarantee the debts of Transystems, executed a guaranty agreement, and mailed it to National Truckers Service in Fort Worth. In reliance on this guaranty agreement, National Truckers continued to extend credit to Transystems. The guaranty agreement provided that payment would be made in Fort Worth and that the guaranty itself was performable at Fort Worth. Subsequently Transystems became delinquent on its accounts, and National Truckers filed suit in Texas to enforce the guaranty agreement. The Court of Civil Appeals held the contacts

of Aero with Texas were sufficient to justify the assertion of in personam jurisdiction by the Texas courts, and we found no reversible error in that holding. Of significance in that case was the fact that Aero voluntarily and purposefully agreed to guarantee the Texas debts of its Texas subsidiary. Aero should reasonably have expected to face suit in the Texas courts in the event its subsidiary defaulted on its obligations.

In *Uvalde Rock Asphalt Company v. Consolidated Carpet Corporation*, 457 S.W.2d 649 (Tex.Civ.App.—Beaumont 1970, writ ref'd n. r. e.), the contract forming the basis of the business relationship was solicited in Arizona by a Texas manufacturer. All debts were payable in San Antonio, Texas. Pursuant to the contract, the Arizona wholesaler placed several orders with the Texas manufacturer. The goods were delivered F.O.B. Houston, and on some orders the Arizona wholesaler requested delivery to Texas retailers. The Court of Civil Appeals concluded that the activity of the Arizona wholesaler was calculated to extract profits from markets in Texas. This factor, coupled with the additional contacts enumerated above, was sufficient to supply the "minimum contacts" demanded by due process.

Estes Packing Company v. Kadish and Milman Beef Co., 530 S.W.2d 622 (Tex.Civ.App.—Fort Worth 1975, no writ), did not reach this Court. In that case a Chicago broker ordered beef from a Fort Worth packing company and resold it to a Massachusetts corporation. The broker sent both parties written confirmations of sale giving shipping instructions stating the beef was to be delivered by truck to the defendant's plant in

Boston. The shipper was an independent contractor unrelated to either the Texas seller or the Boston buyer. The shipment was accompanied by an invoice stating the meat was offered for sale at the prices quoted on the invoice. The invoice also provided "All Bills Payable in Fort Worth." Kadish sent a check to Estes covering a portion of the shipment and noted on the back of the check that it was in full payment of all debts of Kadish to Estes. Estes refused to accept the check with that notation and subsequently filed suit. The Court of Civil Appeals concluded that these facts established the existence of a contract between Kadish and Estes. Further, the court held that due process would not be violated by the exercise of jurisdiction over Kadish even though Kadish's only contact with Texas was the remittance of one check to the Texas seller. This holding conflicts with our holding in the instant case and is disapproved.

[6] The facts of this case bring it within the literal reach of Art. 2031b, but, as detailed above, the due process clause of the Fourteenth Amendment prohibits Texas courts from exercising jurisdiction over Burt in a suit arising out of his contract with U-Anchor. The nature and extent of the contacts of a non-resident with the forum state determine whether or not the forum may exercise in personam jurisdiction over the non-resident, but the infinite variety of such contacts and the vagueness of the constitutional standard render a more definitive articulation of due process requirements impossible. As noted in *Cousteau, supra,* no one formulation of the constitutional test could possibly encompass all the potentially important factors, nor could a formula perform the crucial task of weighing

and balancing the relevant considerations. Narrow factual distinctions will often suffice to swing the due process pendulum. Here, as elsewhere, important constitutional questions prove immune to solution by checklist. *See* Annot., 20 A.L.R.3rd 1201 (1968); Thode, supra; Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts–From Pennoyer to Denckla: A Review,* 25 U.Chi.L.Rev. 569 (1958); Comment, *The Texas Long-Arm Statute, Article 2031b: A New Process Is Due,* 30 Sw.L.J. 747 (1976); Comment, *Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness,* 69 U.Mich.L.Rev. 300 (1970); Note, 34 U.La.L.Rev. 691 (1974).

The judgment of the Court of Civil Appeals is affirmed.

* * *

inference that Salyers & Walley, Inc. had some sort of contract with the owners. Since it is undisputed that Ralph Salyers was one of the owners of the land and was also the person who acted for the corporation in contracting with McPhail for the electrical work, and since "Salyers" is one of the names used in the corporate name, we hold that the evidence supports the further inference that the owners of the land had "control" of the corporation within the meaning of the sham contractor statute. Thus the trial court was authorized to treat appellee as a contractor in a direct contractual relationship with the owner and as entitled to perfect his lien against the property in the same manner as any other original contractor, that is, by taking the steps prescribed by article 5453(1), without complying with the additional requirements applicable

to subcontractors in article 5453(2). *Da-Col Paint Manufacturing Co. v. American Indemnity Co.*, 517 S.W.2d 270, 272-73 (Tex. 1974).

[4] Appellant's third contention is that appellee failed to comply with the notice requirements of article 5453(1) because it failed to mail the notice to Salyers and Caballero, who owned the property at the time the materials were first delivered, rather than to appellant Shaw, who had bought the property in the meantime. We do not agree that the notice must be sent to a former owner rather than the current owner. The statute requires only that notice be sent "to the owner." It is reasonable to interpret this language as requiring notice to the owner at the time the notice is sent because his property is being subjected to the lien. Accordingly, we hold that appellee perfected its lien against appellant's property by timely filing of its affidavit with the county clerk and sending copies to the owner, appellant, by certified mail.

Appellant cites *Inman v. Clark*, 485 S.W.2d 372 (Tex.Civ. App.–Houston [1st Dist.] 1971, no writ) in support of his contention that the notice must be sent to the former owner. In that case, contractors who had dealt with the former owner filed their affidavit after the property had been sold and mailed a copy to the former owner. They brought their suit against the new owners, who defended on the ground that article 5453 required notice to them. The court of civil appeals held that the new owners had constructive notice of the lien because after they had bought the property they were present when the contractors were working and should have inquired as to whether they had been paid. We do not read this case as holding, even by implication, that

a notice to the new owners would not have complied with the statute.

All of appellant's points are overruled for the reasons stated.

Affirmed.

U-ANCHOR ADVERTISING, INC., Appellant,

v.

N. H. BURT, dba Granot Lodge, Appellee.

No. 8668.

Court of Civil Appeals of Texas, Amarillo.

Nov. 22, 1976.
Rehearing Denied Dec. 20, 1976.

Texas advertising corporation which went into Oklahoma in order to solicit business from nonresident defendant brought suit for breach of contract seeking jurisdiction over nonresident defendant under the long-arm statute. The District Court, Potter County, H. Bryan Poff, Jr., J., sustained nonresident defendant's challenge to jurisdiction, and Texas corporation appealed. The Court of Civil Appeals, Robinson, J., held that mere agreement to make payments in Texas did

not establish minimum contacts with state sufficient to satisfy due process requirements for long-arm jurisdiction and to require defendant to come into Texas to defend the suit.

Affirmed.

1. Courts 12(2)

Where contract required nonresident to make his payments in Potter County, Texas, nonresident was "doing business" in Texas within meaning of statute defining that term. Vernon's Ann.Civ.St. art. 2031b.

See publication Words and Phrases for other judicial constructions and definitions.

2. Constitutional Law 305(5)

Even if a nonresident defendant is "doing business" within Texas as defined by long-arm statute, court, in order to establish jurisdiction over nonresident defendant, must still determine whether, under facts of particular case, exercise of jurisdiction offends due process requirements of Fourteenth Amendment. Vernon's Ann.Civ.St. art. 2031b, §4; U.S.C.A.Const. Amend. 14.

3. Constitutional Law 305(5)

In order that court acquire jurisdiction over nonresident defendant without violating due process, court

must determine whether defendant has minimum contact with forum state out of which cause of action arose and factors to consider in determining whether or not there have been minimum contacts are nature and character of business, number and type of activities within forum, whether such activities give rise to cause of action, whether forum has some special interest in granting relief, and relative convenience of the parties. Vernon's Ann.Civ.St. art. 2031b, §4; U.S.C.A.Const. Amend. 14.

4. Courts 12(2)

In order that court establish constitutional jurisdiction over nonresident defendant, it is essential that there be some act by which defendant purposefully avails itself of privilege of conducting activities within forum state, thus invoking benefits and protections of its laws. Vernon's Ann.Civ.St. art 2031b, §4; U.S.C.A. Const. Amend. 14.

5. Courts 12(2)

Activity relied upon to establish minimum contacts necessary to establish constitutional jurisdiction over nonresident defendant may not be mere unilateral acts of plaintiff in the forum state. Rules of Civil Procedures, rule 120a; Vernon's Ann.Civ.St. art. 2031b.

6. Courts 12(2)

Assumption of jurisdiction over nonresident defendant pursuant to long-arm statute must not offend traditional notions of fair play and substantial justice, consideration being given, inter alia, to the quality, nature and extent of the activity in Texas and the benefits and protection of the laws of the state of Texas afforded to the defendant. Rules of Civil Procedure, rule 120a; Vernon's Ann.Civ.St. art. 2031b.

7. Courts 12(2)

Where contract between Texas corporate resident and nonresident, with exception of place of payment, was referable entirely to state of Oklahoma, and where, by making payments in Texas, the nonresident defendant was not afforded any real benefit or protection of laws of the state of Texas, mere agreement to make payments in Texas did not establish minimum contacts with state sufficient to satisfy due process requirements for long-arm jurisdiction and to require defendant to come into Texas to defend breach of contract suit. Vernon's Ann.Civ.St. art. 2031b, §4; U.S.C.A.Const. Amend. 14.

Hal Miner, Amarillo, for appellant.
Kenneth A. Back, Amarillo, for appellee.

ROBINSON, Justice.

Plaintiff in this suit for breach of contract sought jurisdiction over the nonresident defendant under the long-arm statute. The nonresident defendant made his special appearance to challenge jurisdiction. The trial court, after a hearing, sustained the challenge. The plaintiff appeals. Affirmed.

The plaintiff is a Texas advertising corporation which went into Oklahoma in order to solicit business from defendant. Defendant and an agent for the plaintiff executed a contract in Oklahoma calling for plaintiff to erect five roadside advertising signs in Oklahoma for defendant. Payment for the signs was to be made in Potter County, Texas. Defendant made several payments by mail to plaintiff before allegedly defaulting. Defendant is not a Texas resident, maintains no place of business in Texas, and has no agent for service in Texas. Plaintiff sued defendant in Potter County, Texas, and obtained service on defendant by serving the Texas Secretary of State.

Defendant filed his Tex.R.Civ.P. 120a special appearance, and the trial court dismissed the case for want of jurisdiction after a hearing on the special appearance motion. On appeal, plaintiff contends that defendant was doing business within the meaning of Vernon's Ann.Civ.Stat.Ann. art. 2031b (1964), and that defendant had sufficient contacts with the State of Texas so that to sustain jurisdiction over him would not offend traditional notions of fair play and substantial justice.

Article 2031b, §4, provides as follows:

> For the purpose of this Act, and without including other acts that may constitute doing business, any foreign corporation, joint stock

company, association, partnership, or non-resident natural person shall be deemed doing business in this State by entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State, or the committing of any tort in whole or in part in this State.

[1] There can be no question that the nonresident defendant was "doing business" within the meaning of the statute. The contract was performable in Texas, to the extent that it required the defendant to make his payments in Potter County, Texas. *Standard Leasing Co. v. Performance Systems, Inc.*, 321 F.Supp. 977 (N.D.Tex. 1971); *Custom Leasing, Inc. v. Gardner*, 307 F.Supp. 161 (N.D. Miss. 1969); *Estes Packing Company v. Kadish & Milman Beef Co., Inc.*, 530 S.W.2d 622 (Tex.Civ.App.–Fort Worth 1975, no writ).

[2] It is not enough, however, that the facts of a case fit into the provisions of art. 2031b, §4. If they do, the court must still determine whether, under the facts of the particular case, the exercise of jurisdiction over the nonresident defendant offends the due process requirements of the 14th Amendment to the United States Constitution. *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 491-92 (5th Cir. 1974); *Atwood Hatcheries v. Heisdorf & Nelson Farms*, 357 F.2d 847 (5th Cir. 1966); *Estes Packing Company v. Kadish & Milman Beef Co., Inc., supra*, 530 S.W.2d at 623-24; *Pizza Inn, Inc. v. Lumar*, 513 S.W.2d 251 (Tex.Civ.App.–Eastland 1974, writ ref'd n. r. e.).

In *O'Brien v. Lanpar Company*, 399 S.W.2d 340, 342 (Tex. 1966), our Supreme Court articulates three basic elements which must coincide to sustain jurisdiction over a nonresident defendant, as follows:

(1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.

[3, 4] Due process requires that the nonresident defendant have certain minimum contacts with the forum state out of which the cause of action arose. *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958); *International Shoe Company v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). Factors to consider in determining whether or not there have been minimum contacts with the forum are:

(1) The nature and character of the business;

(2) The number and type of activities within the forum;

(3) Whether such activities give rise to the cause of action;

(4) Whether the forum has some special interest in granting relief; and

(5) The relative convenience of the parties.

Hearne v. Dow-Badische Chemical Company, 224 F.Supp. 90, 99 (S.D.Tex. 1963); *Sun-X International Company v. Witt*, 413 S.W.2d 761, 765 (Tex.Civ.App.–Texarkana 1967, writ ref'd n. r. e.); and *Trinity Steel Company v. Modern Gas Sales & Service Co.*, 392

S.W.2d 861 (Tex.Civ.App.–Texarkana 1965, writ ref'd n. r. e.). It is essential that there be some act "by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla, supra.*

Plaintiff cites several cases in which the courts sustained jurisdiction on facts similar to these. In *Estes Packing Company v. Kadish & Milman Beef Co., Inc., supra,* the plaintiff shipped meat to the nonresident defendant on the basis of an order given by the defendant to a broker, who gave the order to plaintiff for a commission. Plaintiff's invoice, which stated that it was payable in Fort Worth, was sent with the meat. When plaintiff sued for the purchase price, the court found the minimum contacts sufficient to sustain jurisdiction in Texas. And in *National Truckers Service, Inc. v. Aero Systems, Inc.*, 480 S.W.2d 455 (Tex.Civ. App.–Fort Worth 1972, writ ref'd n. r. e.), the court sustained jurisdiction over a nonresident who executed a guaranty agreement performable in Texas and mailed it into the state.

Similarly, in *Standard Leasing Co. v. Performance Systems, Inc., supra,* the Federal district court found art. 2031b applicable when the nonresident Tennessee defendant executed an equipment lease agreement with a Louisiana company, which assigned the contract to the Texas plaintiff. The nonresident was held amenable to suit in a Texas federal district court by virtue of having made several payments to the Texas company before allegedly defaulting.

There is another line of cases, however, which we believe more accurately reflects the proper consideration which must be accorded the due process

requirements. In *Pizza Inn, Inc. v. Lumar, supra,* the nonresident defendant not only sent franchise fee payments into Texas, but he came to Texas himself for negotiations, and subsequently executed the franchise agreement and mailed it to the plaintiff in Texas. The court properly found that the defendant had established the minimum contacts necessary to meet the due process requirements. Those contacts are substantially more significant than the ones in the case before us.

[5] In contrast, where the nonresident defendant never came to Texas in connection with the transaction, and all negotiations and payments occurred out-of-state, but the plaintiff shipped merchandise to the defendant FOB Houston, the court held that the minimum contacts had not been established. *Sun-X International Company v. Witt, supra.* This is because the activity relied upon to establish the minimum contacts may not be the mere unilateral acts of the plaintiff in the forum state. *Hanson v. Denckla, supra; Omniplan, Inc. v. New America Development Corp.*, 523 S.W.2d 301 (Tex.Civ. App.–Waco 1975, no writ). But compare *Uvalde Rock Asphalt Co. v. Consolidated Carpet Corporation,* 457 S.W.2d 649 (Tex.Civ.App.–Beaumont 1970, writ ref'd n.r.e.), where there was a similar contractual arrangement, except that the nonresident defendant had the merchandise shipped from one point in Texas to another for its benefit, and the defendant made payments into Texas. The addition of these minimum contacts were necessary to establish jurisdiction.

[6, 7] It is not enough that the nonresident defendant merely do some act or transaction in Texas which gives rise to the cause of action. In addition, the assumption of jurisdiction must not offend traditional

notions of fair play and substantial justice, consideration being given, *inter alia* to the quality, nature and extent of the activity in Texas and the benefits and protection of the laws of the State of Texas afforded the defendant. *International Shoe Company v. Washington, supra; O'Brien v. Lanpar Company, supra.* The contract in the case *sub judice*, with the exception of the place of payment, was refereable entirely to the State of Oklahoma. Moreover, we cannot say that by making payments in Texas, the defendant was afforded any real benefit and protection of the laws of the State of Texas.

It is our opinion that on the facts before us, the mere agreement to make payments in Texas does not establish the minimum contacts with this State sufficient to satisfy the due process requirements for long-arm jurisdiction and to require the defendant to come into Texas to defend the suit. The plaintiff's contention that permitting the suit to be prosecuted in Texas would not offend traditional notions of fair play and substantial justice is overruled. The judgment of the trial court is affirmed.

IN THE SUPREME COURT OF TEXAS

NO. B-6516 July 13, 1977

U-ANCHOR ADVERTISING, INC.)
)
V.) From Potter County,
) Seventh District
N. H. BURT d/b/a GRANOT LODGE)

This cause came on to be heard on writ of error to the Court of Civil Appeals for the Seventh Supreme Judicial District together with the original transcript and transcript showing the proceedings in the Court of Civil Appeals because it is the opinion of the Court that there was no error in the judgment of the Court of Civil Appeals that affirmed the judgment of the District Court, it is, therefore, *adjudged, ordered,* and decreed, that the judgment of the Court of Civil Appeals be, and hereby is, affirmed.

It is further ordered that petitioner, U-Anchor Advertising, Inc., pay all costs expended and incurred in this Court and Court of Civil Appeals; and that this decision be certified to the District Court of Potter, County, Texas for observance.

(Opinion of the Court by Justice Steakley)

July 27, 1977

NO. B-6516

U-ANCHOR ADVERTISING, INC.)
)
V.) From Potter County,
) Seventh District
N. H. BURT d/b/a GRANOT LODGE)

Petitioner's motion for rehearing filed herein on July 26, 1977 in the above numbered and entitled cause having been duly considered, it is ordered that said motion be, and hereby is, overruled. Justice Barrow not sitting.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the foregoing are true and correct copies of the judgment & order of this Court under the dates shown as the originals of same appear in the minutes of this Court under the dates shown.

IN TESTIMONY WHEREOF, witness my hand and the seal of the Supreme Court of Texas at the City of Austin, this the 13th day of October, 1977.

GARSON R. JACKSON, Clerk

By /s/ Mary M. Wakefield
Mary M. Wakefield, Deputy

APPENDIX C

P. O. Box 1yu • Amarillo, Texas 7y105 • Phone (806) 376-5976

U-ANCHOR ADVERTISING

P-1
8-28-75

ADVERTISING CONTRACT

We hereby authorize you to place advertising displays upon E- 5 & 14 @ 16th wb roadway signs for us for a period of sixty (60) months in accordance with the provisions of this agreement and the conditions on the reverse side. The signs shall bear the design on the advertiser side that is mutually agreed upon and shall be erected at the locations shown below. For the above we promise to pay you, at your office in Potter County, Texas, $ 80.00 per month. The effective date of this contract will be the 1st day of the month following installation of the signs on the highway.

Signed this 10th day of Dec. 1973.

ACCEPTED: Grant Lodge
(name of advertiser)

U-ANCHOR ADVERTISING By: X

By: Paul Williams (Salesman) Address 730 S. 10th Clinton, Okla 73601

By: Tim Brent (President)

Date of Acceptance:

Bank Reference: First National Bank of Clinton

LOCATIONS

A
B
C
D
E

- TX-483 I-40 Oklahoma, 115 miles south of I-44 152
- TX-455 I-40, Oklahoma, 37 miles east of Weatherford
- TX-491 I-40 Oklahoma 3½ miles west of Erick
- TX 487 Hwy 183 Oklahoma, 1.6 miles south of Clinton
- TX 488 I-40 - 3.2 miles west of SW 5 & End of Weatherford

APPENDIX D

Among the states with similar provisions in their "long-arm" statutes are, in pertinent part:

Alaska:

[A]rises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services in this state or to pay for services to be performed in this state by the plaintiff. [Alaska Statute §09.05.015(5)(a) (1973)]

Florida:

Breaches a contract in this state by failing to perform acts required by the contract to be performed in this state. [Fla. Stat. Ann. §48.193(g) (Supp. 1977)]

Iowa:

If a foreign corporation makes a contract with a resident of Iowa to be performed in whole or in part by either party in Iowa. . . . [Iowa Code Ann. §617.3 (Supp. 1977)]

Kansas:

Entering into an express or implied contract, by mail or otherwise, with a resident of this state at the time of contracting. [Kan. Stat. §60-308(a)(5) (1976)]

Minnesota:

If a foreign corporation makes a contract with a resident of Minnesota to be performed in whole or in part by either party in Minnesota. . . . [Minn. Stat. Ann. §303.13(3) (1969)]

Mississippi:

Any non-resident . . . who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state. . . . [Miss. Code Ann. §13-3-57 (1972)]

North Carolina:

Out of any contract made in this state or to be performed in this state. [N.C. Gen. Stat. §55-145(a)(1) (1975)]

South Carolina:

. . . entry into a contract to be performed in whole or in part by either party in this state. [S.C. Code §36-2-803(g) (1977)]

Supreme Court, U. S.
FILED
JAN 16 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-614

U-ANCHOR ADVERTISING, INC.,

Petitioner,

v.

N. H. BURT, d/b/a GRANOT LODGE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF FOR RESPONDENT IN OPPOSITION

JAMES D. DURHAM, JR.
KENNETH A. BACK
Attorneys At Law
of Durham & Cornett
510 S. Polk
Amarillo, Texas 79101

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-614

U-ANCHOR ADVERTISING, INC.,

Petitioner,

v.

N. H. BURT, d/b/a GRANOT LODGE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS
RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, N.H. Burt, d/b/a Granot Lodge, respectfully prays that the Court deny issuance of the writ of certiorari in review of Judgment and Opinion of the Supreme Court of Texas entered in this proceeding on July 13, 1977.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

STATUTORY PROVISIONS INVOLVED

Petitioner's statement as to the statutes involved is correct.

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct.

RESPONDENT'S ARGUMENT

Petitioner's description of the questions presented is accurate as stated; Respondent suggests, however, that the ultimate question for review is whether an Oklahoma resident who contracts in Oklahoma with a Texas resident as a result of the Texas resident's solicitation, can be sued in Texas without offending traditional notions of fair play and substantial justice, the Oklahoma resident's only contact with Texas being the mailing of six checks to Texas.

The determination of this question as well as other similar ones has resulted in lower court decisions which at first blush appear to be in conflict. It should be noted, however, that in so-called "long arm jurisdiction cases", fact situations frequently vary in so far as elements of long-arm statutes and due process are concerned. The courts have had, therefore, to focus on different aspects of particular fact situations to arrive at their decisions. The Supreme Court of Texas, in the instant case, correctly applied the guidelines of this Court in deciding the instant case. Under International Shoe Co. v. Washington, 326 U.S. 320, 66 S.Ct. 154, 90 L.Ed. 95, (1945), Hanson v. Denckla, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed. 2d 1283 (1958), and McGee v. International Life Insurance Company, 355 U.S. 220, 2 L.Ed. 2d 223, 78 S.Ct. 199 (1957), Respondent suggests this Court has provided guidelines which

can be applied without conflict to the lower court's decision here. This Court in the three cases cited above has spoken to the issue of fairness and that certain contacts are required of the defendant so that notions of fair play and substantial justice are not offended; the Supreme Court of Texas specifically noted that in Hanson, supra, at 251, this court stated that "...it is a mistake to assume that this trend (to the flexible standard of International Shoe, supra) heralds the eventual demise of all restrictions on the personal jurisdiction of state courts." Due process standards must be applied to facts in given cases to assure that jurisdiction does not violate the due process restrictions.

In McGee, supra, this Court found that the Due Process Clause did not preclude jurisdiction in a case where the contract which was the subject of the suit was delivered in the forum state, the premiums were mailed from the forum state, and the Plaintiff resided in the forum state. Whether the Texas Supreme Court conflicted with the holding in McGee, as Petitioner states, on what constitutes purposeful action, it is still apparent that this Court also looks to the nature, quality and extent of the contacts of the non-resident when determining whether due process has been fulfilled. Respondent suggests that the Courts must look to the contacts of the non-resident with various points of view (depending on the facts) in order to analyze the particular case properly.

Petitioner's analysis of the different approaches is substantially correct, but it fails to note that in almost every case, the particular court uses a stand-

ard with which to apply the guidelines set forth by this Court. The different approaches merely supplement the guidelines of this Court.

It would be an impossible task to set forth a rule with respect to the ultimate question herein, which could be applied in every case involving due process and long-arm statutes. Respondent asserts that the guidelines previously set down adequately inform the lower courts of the rules to be used.

II.

Respondent disagrees with Petitioner's assertion that Burt's actions in entering into the contract constituted purposeful activity. There is no showing that Burt engaged in any activity with the State of Texas other than the mailing of checks to Texas. In fact, Burt could have assumed that all performance of the contract other than sending the checks would be done in Oklahoma; there is no indication that Burt knew or should have known that U-Anchor would perform in Texas since the contract was solicited, negotiated and consummated in Oklahoma, and since the signs were to be placed in Oklahoma. From the surrounding circumstances it cannot be said that Burt "purposefully" availed himself to Texas jurisdiction. Although Petitioner cites McGee, supra, as its authority, McGee is distinguishable because here the activities corresponding with those in McGee were performed in Oklahoma.

When considering fairness and the determination of whether traditional notions of fair play and substantial justice would be offended, Respondent agrees

that the circumstances surrounding the transaction must be examined. Respondent suggests that it is important that he never physically went to Texas, responded to solicitation in Oklahoma, signed the contract in Oklahoma, and that the signs were placed in Oklahoma. The situation here is dramatically different from the classic long-arm case in which the defendant either entered the forum state in person or by communication and solicited activity and business from the forum state. Federal courts and Texas courts have concluded that it must be fair and reasonable to require the non-resident to defend the suit in the forum state. See Product Promotions, Inc. v. Consteau, 495 F.2d 483 (5th Cir. 1974) and Sun-X International Company v. Witt, 413 S.W.2d 761 (Tex. Civ. App. 1967).

Respondent urges that in almost every case involving a long-arm statute, one can discern facts which show at least some connection with the forum state, such as those mentioned by Petitioner in its brief under the subtitle "B. Fairness", (p. 13, Petitioner's Brief). However, it can be easily discerned that except for payments to Texas, the contacts with Texas are minimal at best when viewing the entire situation.

One must consider the activity in the forum state by the non-resident, the relative convenience of the parties, benefits and protection of state afforded the respective parties and basic equities. Bland v. Kentucky Fried Chicken Corp. (D.C. 1971) 338 F. Supp. 871; O'Brien v. Lanpar Company, 399 S.W.2d 340 (Tex. S. Ct. 1966). The activity in the forum state has been discussed. It appears that after having solicited and done busi-

ness in Oklahoma, it would not be wholly inconvenient for U-Anchor to sue Burt in Oklahoma. However, for Burt to defend himself in Texas, considering that most activity surrounding the contract happened in Oklahoma, would be inconvenient. Burt had reason to believe that U-Anchor would clothe the contract with Oklahoma law since U-Anchor performed, to Burt's knowledge, in Oklahoma. Basic equities point to maintaining the action in Oklahoma.

If the Texas Supreme Court's opinion is affirmed, Article 2031b would not necessarily be rendered unconstitutional. It stands to reason that a long-arm statute may only extend as far as due process may permit; however, even though a case may fit literally within the statute, due process may also limit its application when the totality of facts is considered, and do so without rendering the statute unconstitutional. That is the case here.

CONCLUSION

For the reasons stated above, it is evident that different approaches have been used to determine cases of similar nature; it is also evident that lower courts have been guided by this Court's decision in using their approaches. The Supreme Court of Texas, using its approach, correctly decided the question of jurisdiction in this case. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JAMES D. DURHAM, JR.

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KENNETH A. BACK

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